S.B.Criminal Revision Petition No.1329/2007

Smt. Mobina & Anr.
v.
State of Rajasthan

Date of Order :: 5th December, 2007

HON'BLE MR.JUSTICE GOVIND MATHUR

Mr. P.C.Solanki, for the petitioners.
Mr. V.R.Mehta, Public Prosecutor.

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Upon a police report Additional Chief Judicial Magistrate (SD) No.3, Jodhpur by order dated 29.10.2007 took cognizance of offences under Sections 366, 376 and 120-B IPC against petitioners Smt. Mobina and Kumari Meenaz alongwith Gulamnabi and Tufail, hence this petition under Section 397 read with 401 Cr.P.C. is preferred.

The factual matrix necessary to be noticed is that Smt. Durga, a lady of about 30 years, submitted a written complaint at police station Mahamandir on 24.7.2007 stating therein that she was residing at her in-laws house in the neighbourhood of Shri Gulamnabi. The neighbours were keeping good relations with her though they were not maintaining relations with her in-laws. Some photographs of her were taken by Shri Tufail son of Gulamnabi through his mobile cellular phone. Tufail also gave a mobile cellular phone to her to have talk with her mother and

this fact came into knowledge of her husband, thus, being frightened she left for her maternal home with her brother. On next day i.e. on 5.7.2007 she made a phone call to Tufail and said that she was going to tell everything to her husband. While on way Tufail met and told her to accompany him. His parents and sister also met her on way and they offered cold drinks to her and after having that she found herself with Tufail on way to Pali, however, she and Tufail returned to Jodhpur as the road to Pali was closed. Then they went to Ajmer and then to Delhi and stayed there for 4-5 days. Tufail then brought her to Bangalore and several times committed rape with her. After few days while returning to Jodhpur Tufail left her alone in train at Merta Road and then after reaching at Jodhpur she narrated entire story to her parents and also submitted complaint at police station. On basis of the complaint aforesaid a case for offences under Sections 366, 376 and 384 IPC was registered and investigation was launched.

Prior to submission of complaint above Shri Chetan Prakash also submitted a written report at police station Mahamandir on 6.7.2007 about missing of his sister Smt. Durga.

The investigating agency filed its report as per provisions of Section 173 Cr.P.C. before the competent court alleging commission of offences under

Sections 366, 376 and 120-B IPC by Tufail (aged about 24 years), Gulamnabi (father of Tufail, aged about 52 years), Mobina (mother of Tufail, aged about 42 years) and Kumari Meenaz (sister of Tufail, aged about 18 years), cognizance thereupon was taken by the order impugned.

While assailing validity of the order taking cognizance against Smt. Mobina and Kumari Meenaz, the contention of counsel for the petitioners is that no material is available in police report and the documents annexed thereto on basis of which cognizance could have been taken against the petitioners for the offences punishable under Sections 366, 376 and 120-B IPC. It is asserted that no cognizance for offence under Section 376 could have been taken against the petitioners being women. To substantiate the contention reliance is placed upon the law laid down by Hon'ble Supreme Court in the case of Priya Patel v. State of M.P. & Anr. [(2006)3 SCC (Cri) 96], holding as follows:-

> "8.A bare reading of Section 375 makes the position clear that rape can be committed only by a man. The section itself provides as to when a man can be said to have committed rape. Section 376(2) makes certain categories of serious cases of rape as enumerated therein attract more severe punishment. One of them relates to "gang rape". The language of sub-section (2)(g)

provides that whoever commits “gang rape” shall be punished, etc. The Explanation only clarifies that when a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each such person shall be deemed to have committed gang rape within this sub-section (2). That cannot make a woman guilty of committing rape. This is conceptually inconceivable. The Explanation only indicates that when one or more persons act in furtherance of their common intention to rape a woman, each person of the group shall be deemed to have committed gang rape. By operation of the deeming provision, a person who has not actually committed rape is deemed to have committed rape even if only one of the group in furtherance of the common intention has committed rape. “Common intention” is dealt with in Section 34 IPC and provides that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it was done by him alone. “Common intention” denotes action in concert and necessarily postulates a pre-arranged plan, a prior meeting of minds and an element of participation in action. The acts may be different and vary in character, but must be actuated by the same common intention, which is different from the same intention or similar intention. The sine qua non for bringing in application of Section 34 IPC is that the act must be done in furtherance of the common intention to do a criminal act. The expression “in furtherance of their common intention” as appearing in

> the Explanation to Section 376(2) relates to the intention to commit rape. A woman cannot be said to have an intention to commit rape. Therefore, the counsel for the appellant is right in her submission that the appellant cannot be prosecuted for alleged commission of the offence punishable under Section 376 (2)(g)."

It is also asserted that no iota of evidence is there to allege participation of the petitioners in any offence punishable under Section 366 IPC and also for participating in any conspiracy relating to abduction of any woman with intent that she may be compelled to marry any person against her will or in order that she may be forced or seduced to illicit intercourse of knowing it to be likely that she will be forced or seduced to illicit intercourse. According to counsel for the petitioners the necessary ingredients to constitute an offence under Section 120-B are conspicuously missing in entire prosecution case. Emphasis is given that there is no sign of any agreement either for doing an illegal act or for doing an act by illegal means or for breaking the law that is the act which is made punishable under Indian Penal Code.

Per contra, learned Public Prosecutor has pointed out contents of the complaint and the statements of Smt. Durga recorded as per provisions of Section 161 Cr.P.C. wherein she has stated that

parents and sister of Tufail met her on way and offered her cold drinks that resulted into vertigo.

Heard counsel for the parties.

The law is well settled that jurisdiction to quash the cognizance taken should be exercised sparingly and only in exceptional cases. The law is equally settled that when the allegations made in complaint or police report, as the case may be, even if taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused, the Court may quash the order taking cognizance of the commission of the offence alleged. The Court is required to examine as to whether uncontroverted allegations made in the first information report and the evidence gathered in support of the same do disclose to commission of any offence? Hon'ble Supreme Court in the case of Rupan Deol Bajaj v. KPS Gill [1995 SCC (Cri) 1059] and also in the case of Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd. [2000 SCC (Cri) 615], while considering the issue relating to quashing of complaint itself, held that, if a prima facie case is made out disclosing ingredients of the offences, Court should not quash the complaint but if the allegation do not constitute any offence as alleged and appears to be patently absurd and improbable, Court should not hesitate to quash even the complaint.

The scrutiny of police report and the documents annexed thereto is to be made in light of the principles referred above.

In the instant matter as per the police report, complainant prosecutrix is of about 30 years and having a married life of about 14 years and having two children. The petitioners are her neighbours and she was keeping good relations with them. The petitioner No.1 is mature middle aged lady of 42 years and the petitioner No.2 is her daughter, aged about 18 years. In entire police report and the documents thereto there is no specific allegation against the petitioners. In general it is stated in the complaint that on 6.7.2007 parents of Tufail and his sister met to her on the way and offered cold drinks to the prosecutrix. Prior to that the prosecutrix also had normal talks with them. In the statements given under Section 164 Cr.P.C. by the prosecutrix on 20.8.2007 (CR No.374/07, police station Mahamandir) she has not uttered a single word about her meeting with Mobina or Meenaz. In quite specific terms in the statements under Section 164 Cr.P.C. she has stated that she made a phone call to Tufail and then on next day he carried her forcely on his motorcycle. She further stated that she proceeded with Tufail by car for Ajmer. In entire statements there is nothing relating to the petitioners. Even from the averments contained in complaint the petitioners cannot be connected with any

offence as alleged. There is no averment in the police report and the documents annexed thereto on basis of that it can be said that the petitioners were part of any criminal conspiracy that resulted into abduction of a woman. The ingredients to constitute an offence under Section 120-B IPC are conspicuously absent in the instant matter. The entire story, so far as it make effort to connect the petitioners with the offences alleged, is highly improbable and patently absurd. On basis of the evidence available on record no offence punishable under Sections 120-B and 366 IPC can be made out against the petitioners.

It is true that an offence punishable under Section 120-B IPC can be proved by circumstantial evidence and lack of direct evidence would not fail the prosecution story, but in the instant matter what to talk of trustworthy chain of circumstances. There is nothing on record on basis of which even prima facie it can be found that the petitioners in any manner having an agreement for doing any illegal act or for doing an act by illegal means or for breaking the law that is punishable under Indian Penal Code.

The petitioners are ladies and, therefore, as per the definition of rape prescribed under Section 375 Cr.P.C. and also as per the law laid down by Hon'ble Supreme Court in the case of Priya Patel (supra) they cannot be held guilty of committing rape.

In view of the discussion made above, I am of the considered opinion that learned Additional Chief Judicial Magistrate seriously erred while taking cognizance against the petitioners for the offences punishable under Sections 366, 376 and 120-B IPC.

Accordingly, this revision petition deserves acceptance, hence the same is allowed. The order impugned dated 29.10.2007 to the extent it relates to taking cognizance against the petitioners for the offences under Sections 366, 376 and 120-B IPC is quashed.

(GOVIND MATHUR),J.

Kkm/ps.